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Citation for this version:

Fitzpatrick, Peter (2006). 'The new constitutionalism': globalism and the constitution(s) of nations. *London: Birkbeck ePrints*. Available at:
<http://eprints.bbk.ac.uk/697>

Citation for the publisher's version:

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‘The new constitutionalism’: The global, the postcolonial and the constitution of nations

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To appropriate one’s own time has always been unheard of. But everyone can clearly see that it is time: the disaster of sovereignty is sufficiently spread out, and sufficiently common, to steal anyone’s innocence.

Jean-Luc Nancy¹

1. INTRODUCTION

Warily, but I hope not too wearily, I want to return to some old ground in constitutional law and question certain distinctions which go to constitute it.² These are distinctions between the international and the national, public law and private law (a distinction which seems to retain a stronghold on the ordering of legal knowledge in South Africa), the distinction between written and unwritten constitutions, and the whole divide between what typically goes in a constitution and what typically does not. My purpose in departing from such distinctions is not simply to better order or disorder our legal knowledge

¹ Nancy J-L *Being singular plural* (trans. Richardson R and O’Byrne A) (2000) 142.

² This is an extended and updated version of a keynote talk given at the conference ‘Constitutional law and legal theory’ held on 9-10th September 2003 at the University of the Western Cape and hosted by the Faculties of Law at the Universities of Cape Town, the Western Cape and Stellenbosch, and by the Research Unit for Legal and Constitutional Interpretation. For their unparalleled hospitality my thanks go to the organisers of the conference, to Jacques De Ville, and to Christa and André van der Walt. The intellectual companionship of Stewart Motha has alerted me to much that had to be read or read anew.

but, rather, to show how these distinctions increasingly obstruct an adequate perception and an adequate response to that which goes to the making, to the constituting of constitutions, and thence to the terms of our being together. This is a growing inadequacy which is not only legal in the narrow sense but political and ontological as well. Broadly, if a constitution, both legally and mythically, is to relate somehow to what a people is and to what it is becoming, then the constitutional frame as it is usually understood is coming to be more and more limited. This is a rash, not to say rude, thesis to advance in a country which so recently produced what many would aptly see as the most progressive constitution of the twentieth century, but a consolation may be that this is a constitution better poised than most to respond to the imperatives I will be outlining.

There is, however, a current perspective on constitutions and constitutionalism which could be seen as responding more immediately in a way to the concerns I have just evoked. This is the 'new constitutionalism' which several obliging academics now see emerging within international treaties and within what were once delimited as economic organisations – the World Trade Organisation (WTO) being the most juridically explicit carrier of this supposed constitutionalism – or these scholars would extract constitutional virtue from the nostrums of 'good governance' and such required by the World Bank and the International Monetary Fund (IMF) in their imposition of 'conditionalities' and 'structural adjustment programmes', sometimes rendered in the apt acronym of SAPs.³ Or there is Hardt and

³ For a critique see Kelsey J 'Global economic policy-making: A new constitutionalism?' in Kelsey J (ed) *International Economic Regulation* (2002) 501. The term 'new constitutionalism' has been influentially used also to describe a perceived increase globally in judicial power, including in South Africa: see Hirschl R *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004).

Negri's *Empire* (2000) with its discovery of an incipient global constitution, an emergent juridical world order.⁴

All of which is not simply to rehearse the worn thesis of the decline of the nation state in the advance of globalisation, but it is to subscribe to the more astute perception that the global, or the international, and the national are mutually formative.⁵ My concern will be with a consequence of that perception, with a certain indistinction between the international and the national. That concern extends to how that indistinction constitutes the national and the international, although my main focus here will be on the national, on the dependent constitution of nation. And, as my incendiary epigraph would suggest, a concentration of that focus will be found, eventually, in an appropriative sovereignty – that sovereignty suscitating the national constitution.

The analysis cannot, however, rest content with the constitution of the national domain in its relation of indistinction to the international since that same analysis reveals that the constituent indistinction is not confinable at all. So, the indistinction extends not only to what is nominally outside of the national domain but also to what is nominally within it, to what is usually and assuredly taken to be within the national domain and subject to its constitution. It is here, the nominal within, that an equivalent 'new constitutionalism' can be found in the 'new federalism' in which power is transferred from the centre to the federated units, or found in that 'asymmetrical federalism' in which different units assume differential

⁴ Hardt M and Negri A *Empire* (2000); and for a critique see Fitzpatrick P 'The immanence of *Empire*' in Passavant P and Dean J (eds) *Empire's new clothes: Reading Hardt and Negri* (2004) 31.

⁵ Buchanan R and Pahuja S 'Legal imperialism: *Empire's* invisible hand?' in Passavant P and Dean J (eds) *Empire's new clothes: Reading Hardt and Negri* (2004) 73.

configurations of power within the national domain, or, to take a final example, found in the new terms of 'recognition' of indigenous groupings.⁶ The latter will provide a telling instance for the South African situation. Thence ensues the drama that is the postcolonial sovereignty of South Africa, a drama encapsulated in the constitutional blazon of 'One *law* for One *nation*' – a 'drama' because such a consummation could hardly be more justifiably claimed yet more justifiably challenged.

2 CONSTITUTING CONSTITUTIONS

Some basics to start with, mercifully brief, and trying desperately not to sound like the first lecture in Constitutional Law I. In the UK that initial lecture would plunge into what the fresh-faced audience must perceive as an arcanum, the distinction between written and unwritten constitutions. Both quantitatively and, in ways, qualitatively, the unwritten is the marginal category, being confined to a few countries and constitutionally underdeveloped. Within the conceptual scheme of Constitutional Law, that is a perspective I would want to reverse considerably. One way of questioning the claims, especially the sovereign foundational claims, of the singular written constitution is to regard its variability. The world's longest constitution – the Indian, although it is now almost matched in this by the forlorn draft constitution of the European Union –⁷ seeks a constitutional comprehensiveness but no one would claim that this is achieved. It could be contrasted with the Australian which is very short indeed and does not cover many matters normally found in written

⁶ The 'recognition of indigenous groupings' will be considerably referenced later. For 'asymmetrical federalism' a survey can be found in McGarry J 'Asymmetrical federalism and the plurinational state', a working draft paper available at <http://www.federalism2005.be/home/attachment/i/580>; and for an analysis see Requejo F 'Cultural pluralism, nationalism and federalism: A revision of democratic citizenship in plurinational states' (1999) 35 *European Journal of Political Research* 255. For a compendious account of the 'new federalism' see http://en.wikipedia.org/wiki/New_federalism.

⁷ See http://europa.eu/constitution/en/allinone_en.htm. Although not adopted as such, the draft constitution is obliquely and highly effective. I will return to it shortly.

constitutions, such as the composition, even the very presence, of the Executive. But no matter how close to complete a written constitution may be, in these poststructural times it can hardly be an adventurous observation to say that, in its very quality of being in written language, constitutional content cannot be referentially enduring or complete. Not only must any claim to a contained fixity fail, but that very failure, that lack of and in language, makes up the constitutional content itself. Putting it in terms more attuned to the law, no law as presently posited can of itself extend determinatively in its 'application'. Mercifully for the endurance of the legal profession, that failure of application always calls for interpretation and judgement. It calls thence for the endowing of law with new content.

The unwritten constitution, the constitution not definitively contained within a singular written document, generically accommodates this constituent lack. This is something usually associated, in the UK at least, with the constitution having something of a foundation in the common law, with the intrinsic recognition that all laws are *leges temporis*, the recognition that law could always and infinitely adapt and change in a responsive regard to whatever impinged on it. Nonetheless and along with this infinite adaptability, there is the continuist assumption underpinning the UK, or really the English, constitution, that it has somehow existed immemorially, and that it continues adaptively to exist, without the nasty, ruptural breaks typifying the constitutions of less enlightened climes. What this absence of sharp demarcation meant also, as Dicey recognised, was that there could be no qualitative distinction between the constitution and the ordinary law.⁸ The obvious problem then becomes not only that the constitution is, in Bentham's

⁸ Dicey *A Introduction to the study of the law of the constitution* 8 ed (1915) 115-7.

terms, plunged into ‘the dark Chaos of the Common Law’⁹ but that there is no way of marking apart what may be constitutional and what may not be. Of course, there is a historic alternative to this strange Whiggish amnesia which the English indulge in. They did have, in the space of one century, not only one revolution but two, and it was those very revolutions which set the common law in its constitutional or foundational character, and demarcated certain matters as constitutional – so much so that ‘the English constitution’ became a distinct model for others. What results, in all, is an elegant engine having a cohering yet protean being, one which can continuously absorb new matter yet somehow remain existent in itself.

The two dimensions extracted from the English constitution conspicuously characterise constitutions generally. With one dimension, the constitution is seen as performatively constituting an enduring entity, an entity which minimally is the government of a ‘people’, giving some ultimately enforceable effect to their being together. It is a foundation, a charter voicing an ‘original intent’. Often, as in the cases of the English and South African revolutions, it is a ‘settlement’ of long-standing conflict. Yet constitutions are equally noted for what would seem to be opposed characteristics. If a constitution is to ensure the being together of a people, it must be capable of responding to the infinity of effect which such being together generates through time. It must, then, be incipiently changeful, devoid of any enduring content. This other dimension is integrated into the constitutional scheme in such ways as the constitutional amendment, judicial interpretation, and horizontal application. These ways are characteristically seen as marginal changes in or adaptations of something enduringly present. The first, determinate dimension of constitutions, the

⁹ See Lieberman D *The province of legislation determined: Legal theory in eighteenth-century Britain* (1989) 239.

scene of foundation and such, *predominates* in the occidental thought of constitution.¹⁰

To unsettle, even reverse that predominance, I will call in aid one of Mandela's contributions to Jurisprudence with its matching of these two dimensions of constitutional being. On the one side, as it were, there is Mandela the relentless and rather well qualified realist critic of the law. This was a law all-to-present, all-to-fixed in the oppressive divisions it would create and enforce, a law undeserving of any 'idealistic' view and beholden only to 'the ruling class'.¹¹ His position, however, is more nuanced than either an idealist or a realist view. We can see it manifested in his trials. His perception of them could hardly have been more relentlessly realist, yet he used the legal procedure, along with law's intrinsic relation to the hearing, to draw a wider community into a resistant participation in the law.¹²

Mandela fuses this positioning with a more general perception that is at once theoretical and programmatic. Here we find Mandela now existentially identified with the law. In the very midst of a realist critique he lauds the court system as 'perhaps the only place in South Africa where an African could

¹⁰ Hence the constitution in its formally instituted or legal sense comes to match something of 'constitution' in its more general sense – not that I will relinquish this ambiguity in the rest of the paper. That general sense is intriguingly bifurcated. One strand of meaning, closer to the etymology, entails a generative 'action of constituting, making, establishing' or the dynamism of 'a way in which anything is constituted or made up' (*The Oxford English Dictionary* 'constitution' meanings 1.a. and 4.a.). Despite a prominence given to this sense in *The Oxford English Dictionary*, the other strand of meaning now prevails, at least in occidental usage. The sense is now something set, 'an ordinance, settled arranged, institution', 'the system or body or fundamental principles according to which a nation, state, or body politic is constituted and governed' (*The Oxford English Dictionary* meanings 3.b and 7).

¹¹ Mandela N *Long walk to freedom: The autobiography of Nelson Mandela* (1995) 309.

¹² *Ibid* at eg 384-95 and 428-31.

possibly receive a fair hearing and where the rule of law might still apply'.¹³ Mandela presents himself before the very law he rejects, 'rejects in the name of a superior law, the very one he declares to admire and before which he agrees *to appear*'; and he does so because he 'regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against this discrimination which is essentially unjust'.¹⁴ Mandela, it would seem is now of an 'idealistic view' and clean contrary to Mandela the realist, but not so.

The 'superior law' which Mandela affirms is not something set apart from or something simply about the existent law. Rather, it is integral to law as it is. Mandela advances a conception of professional duty which operatively respects and admires both the law and its judicial institution, even as the pervasive legal oppressions of apartheid are being brought to bear on him.¹⁵ The law which calls forth this magnanimous regard is the law that incipiently extends beyond its determinate existence, the law that responsively orients that existence towards the possibility of its being otherwise, and towards a corresponding possibility of its inclusive and equal extension to all groups in South Africa – towards a more inclusively whole South African society.¹⁶ In all, such responsiveness is intrinsic to law as it is. Law, to be law, cannot be contained in its determinate presence.

3. BEING TOGETHER

¹³ *Ibid* at 308.

¹⁴ See Derrida J 'The laws of reflection: Nelson Mandela, in admiration' (trans. Caws M and Loenz I) in Derrida J and Tlili M (eds) *For Nelson Mandela* (1987) 13 at 27, 35 (his emphasis).

¹⁵ *Ibid* at 15-16, 33-37.

¹⁶ *Ibid* at 19-21. Not that one should be Panglossian about this. The return from the responsive to the determinate can be 'very close to the bad, even to the worst': Derrida J 'Force of law: The "mystical foundation of authority"' (trans. Quaintance M) in Derrida J *Acts of religion* (2002) 230 at 257.

It should be apt now, in an engagement with constitutions, to offer a theory of the constitutive force imported by Mandela's poignant identification of these opposed dimensions – the dimension of determinate existence and the dimension of responsiveness to what is ever beyond determinate existence,¹⁷ and that theory is pending; but allow me first to give it an expectant setting by returning to the opening problematic of the national and the international and the integral relation, and hence indistinction, between them. Here a sliver of that relation called international law will be taken as a 'case'.

Of course the standard constitutive claim here is that international law is the utterly dependent creation of nation. This dependence, along with the characteristic claim to a sovereign completeness of nation, makes the international an impossibility. As Bauman puts it, 'in a world fully and exhaustively divided into national domains, there was no space left for internationalism'¹⁸ And innumerable international lawyers have followed Hobbes for whom 'the law of nations' allowed of no overarching rule, no commonality of its own, nothing to set against the national Leviathan.¹⁹ In the result, as one critical commentator puts it, there is 'a *void* at the very heart of international law which is marked by the myth [meaning falsity] of international legal order'.²⁰ The strangeness of all this is condensed in Vattel's decree that, although there could be universal duty binding its members, the society of nations was not to involve any of its particular members 'yield[ing] ... rights to the general body': each independent state claims to be, and actually is,

¹⁷ This is a reduction stripped of the ethical charge integral to Mandela's formulation.

¹⁸ Bauman Z *Modernity and the holocaust* (1989) 53.

¹⁹ Hobbes T *Leviathan* (1651, reprinted 1952) 159 – chapter 30.

²⁰ Carty A 'Myths of international legal order: Past and present' (1997) 10 *Cambridge Review of International Affairs* 3 at 10 – his emphasis.

‘independent of all the others’.²¹ This would involve an impossibly pure plurality, a plurality of singularities. As Donald Davidson would put it, albeit in a different but comparable setting, different entities all relating plurally would ‘make sense...only if there is a common coordinate system on which to plot them; yet the existence of a common system belies the claim to dramatic incomparability’ and, it could be added, the claim to simple singularity.²²

With international law this ‘common system’ is most aptly concentrated in the so-called doctrine of recognition. In one of its two branches this doctrine offers its own explicitly ‘*constitutive* theory’ in which recognition consists in international law constituting nation-particulates, the very entities that supposedly constitute it.²³ The supremacy of nation is retrieved in the other branch of the doctrine, the declaratory or evidentiary theory. Here legal recognition of the nation by international law involves ‘merely a formal acknowledgment of an established situation or fact’.²⁴ Yet, there could be few exercises in sustained academic futility more extensive than the effort to define or delimit nation as ‘established situation or fact’, or indeed to define or delimit it as anything at all.²⁵

Decidedly, then, it is international law which provides Davidson’s ‘common coordinate system’ – provides the constituent criteria to which the ‘sovereign’ nation must conform if it is to be ‘recognised’ as having effective

²¹ De Vattel E *The law of nations or the principles of national law applied to the conduct and to the affairs of nations and sovereigns* 3 (1916) 9.

²² Davidson D ‘On the very idea of a conceptual scheme’ in Rajchman J and West C (eds) *Post-analytic philosophy* (1985) 129 at 130.

²³ For the ‘doctrine’ and the term see Shearer I *Starke’s international law* 11 ed (1994) 120 – his emphasis.

²⁴ *Ibid.*

²⁵ See Fitzpatrick P *Modernism and the grounds of law* (2001) chapter 4 for a survey and analysis of such efforts.

existence. There is nothing self-evident, natural or intractable about these criteria. Rather, they are criteria derived from the formation of the modern occidental nation, criteria peculiarly oriented around an intense attachment to landed territory, and as such criteria that would include some modes of existence and bluntly exclude others of an at least commensurate geographical range and existential affectivity – the vast tributary networks of West Africa, for example. As Blomley's account of the emergence of modern landed notions of space shows so vividly for England, nation and law become conjointly bound in a space that is itself becoming 'increasingly rarefied and institutionalised'²⁶ - or, in short, territorialised. In that gregarious spirit, *The Oxford English Dictionary* offers an uncertain but revealing etymology of territory in which the concept is derived 'from *terrēre* to frighten, whence...*territōrium* "a place from which people are warned off"'.²⁷ As well as this definable territory, recognition in international law requires a nation state to be in effect unitary, autonomous, sovereign, and capable of observing the requirements of international law.²⁸ So, in recognising a nation state, in the evocation of its existence in terms shared with other nation-states, international law constitutes singular entities having the qualities required to constitute it.

The outcome, then, can be summarised with alarming brevity as an inconclusive constituent alternation between nation and international law. If this alternation is to be more than a mere *mêlée*, then some sense must be made of it. That will now be attempted by extracting an existential logic from

²⁶ Blomley N *Law, space, and the geographies of power* (1994) 69 and generally chapter 3. See also Schmitt C *The nomos of the earth in the international law of the jus publicum Europaeum* (2003) Parts I and II.

²⁷ *The Oxford English Dictionary* (2005).

²⁸ There are varying formulations: See Shearer (fn 23 above) 85, 119-20.

the imperative of being together, an imperative which is here simply assumed. Although I will begin with a general portrayal of this logic, the terminology used will connect it to the earlier analysis of the determinate and the responsive dimensions of law.

Logically then, and as Davidson indicated earlier,²⁹ with solitary singularities no commonality can subsist in an incommensurable diversity. Or, in the alternative, if the only allowable possibility remains that singularities in common are incommensurable, then the only available commonality would require them to be the same as each other and hence entirely commensurable. Or we could seek some surpassing truth in which singularities were subsumed, and thence singularity would come to its antithesis. So, in being together, singularities cannot subsist simply as singular, as incommensurable. This is not only because of the common claim that any singularity involves a relation in commonality to which singularity must give way, at least to some extent. Rather, and paradoxical as it may seem, the very existence and maintaining of singularity in being together depends upon the dimension of commonality. The alternatives, as we saw, entail the loss of singularity either in sameness or in a subsumption to some terminal truth.

If, however, singularity is constitutently attuned to a commonality, the commonality itself has to be responsive to the singularity. Singularity would be lost if the commonality on which it depends were enduringly set. The determinative elevation of a determinate content to the commonality would be inimical to the illimitable variety of possible relation between singularities and to the illimitable responsiveness needed to give affect to possible relation.

²⁹ See fn 22 above and the accompanying text.

Yet this commonality, in turn, cannot be passively responsive, an utterly receptive vacuity, since that would leave the only available commonality as an entirely commensurable sameness, and this would be to deny singularity. So there has to be a dimension of determinate content to the commonality.

Law, as we saw, combines these dimensions of the commonality entailed in being together. Likewise with nation itself, another mode of being together, there is an operative combining of determinate content with a responsiveness to whatever may come from beyond what that content is for the time being. That responsiveness, given the logic of being together, is illimitable, yet it must be integrated into the determinate dimension of nation. It cannot simply be the conduit for an occasional and marginal adaptation to the otherwise enduring determinateness of nation. Nor, given this necessarily illimitable quality of nation's responsiveness, can it be definitively contained within or divided between what is inside nation and what is outside. For there to be the determinateness of nation, however, there must be some bordering of the determinate, some inside and outside. Yet the pervasive and illimitable quality of nation's responsiveness, as well as nation's constituent relation to the commonalities of the international and the global, result in an indistinction between what is inside and what is outside, and we must expect to find the same phenomena on both sides of the border.

4 THE NEW CONSTITUTIONALISM 1

The new constitutionalism, nonetheless, is typically placed on one side of the border, on the outside. From that outside inevitable 'tensions arise between the old constitutionalism and the new', tensions usually resolved in favour of

the new so far as constitutions of the South are concerned.³⁰ Tension is often avoided by more compliant national constitutions when, in the so-called 'race to the bottom' to gather the crumbs of the neo-liberal dispensation, they are amended in conformity with it. The Peruvian Constitution of 1993, for example, embraces the free market and foreign investment and limits state welfare and state economic activity. Critical accounts would, with some cogency, see such accommodating changes in 'old' constitutions as yet more confirmation of the advance of globalisation in the decline of the nation state, yet already we see conventional theory creakingly turning from the exaltation of globalisation towards a reconfiguration of the insistent nation-state, Bobbitt's account of the emergence and growth of powerful 'market states' being perhaps the most conspicuous contribution so far.³¹ Yet, there are more 'cosmopolitan' absorptions of constitutional matter, such as the receptiveness of national judiciaries to standards of international human rights,³² and that constitutional matter could be seen as effects of the new constitutionalism even if the term usually signals some significant presence of capitalist economic relations.

Initially I will extract indicative contents of the new constitutionalism from an amenable instance, one close to types of national constitutions – the draft constitution of the European Union. Since this paper was first presented that draft constitution has become moribund in its formal adoption, but it serves as a touchstone in decision-making by institutions of the European Union, most significantly by the European Court of Justice. So, although there is but a

³⁰ Kelsey (fn 3 above) 511 for the quotation and 512-13 for the point about resolution and for a South African instance.

³¹ Bobbitt P *The shield of Achilles: War, peace and the course of history* (2002).

³² See eg Slaughter A-M 'A typology of transjudicial communication' (1994) 29 *University of Richmond Law Review* 99; Slaughter A-M 'Judicial globalization' (2000) 40 *Virginia Journal of International Law* 1103.

remote prospect of this constitution becoming directly applicable within the constitutional scheme of the Union's member states, it will nonetheless have a most profound and enduring impact on them. In one way the draft does not look constitutionally exceptional. It has a long and typically self-effacing preamble which begins: 'Conscious that Europe is a continent that has brought forth civilisation...'.³³ Then follows the kinds of powers and structures one would expect in a federal constitution. But there are two remarkable differences, both of which tend to typify the new constitutionalism. For one, there is a pervasion of economic or, more specifically, market relations. For example, the kinds of rights normally found in constitutions combine with and reinforce the rights at the core of the European Union. So, in an exalted Charter of Rights there nestles the freedom to conduct a business; or the charged idealism in such aims as 'the sustainable development of the Earth' and 'the eradication of [world] poverty' sits with the Union's duty to contribute to the cause of 'free and fair trade'.³⁴ In that spirit, the constitution embodies the Union's prime commitment to the 'establishment and functioning of the internal market' and to that end it would ensure the 'free movement of persons, services, goods, and capital, and the freedom of establishment'.³⁵

Beside the economic impetus, the other remarkable difference found with the new constitutionalism is that the typical constitutional concern with matters or aspirations of great import jostle now with numberless matters of seeming detail, matters of comparatively inconsequential import, such as a concern with 'promoting co-operation between sporting bodies' and with 'protecting the physical and moral integrity of sportsmen and sportswomen' – which is in itself

³³ Fn 7 above, Preamble.

³⁴ *Ibid* Part I Title II Article II-76 and Article I-3(4)

³⁵ *Ibid* Part I Title I Article I-4(1), Part III Title III Chapter I Section 1 Article III-130(1).

may seem puzzling until one remembers the ‘big business’ and general corruption associated with sport in Europe.³⁶

There are, beside the European Union, broadly similar combinations where constitutional matters of a more traditional kind shelter an element of capitalist economic relations. The ‘Charter of Paris for a New Europe’ of 1990, bringing a formal conclusion to the Cold War, announced ‘a new era of democracy, peace and unity’ in which ‘human rights, democracy and the rule of law’ are tied to the market economy.³⁷ Human rights also serve prominently in ‘The Nine Principles’ guiding ‘The Global Compact’ for cooperation between the United Nations and ‘the private sector’.³⁸

The balance between the traditionally constitutional and the economic shifts more to the latter with requirements found within programmes of structural adjustment or within conditionalities, not just emanating from such as the World Bank and the IMF but increasingly attached to agreements for ‘aid’, the relief of debt, and trade – many such requirements finding their way into constitutions and into institutions usually associated with constitutional ordering, and more so of late when these requirements have turned more to promoting ‘good governance’. The relevant constitutional precepts divide into the guiding axioms of democracy, human rights and the rule of law. But what is different about these precepts is their explicitly instrumental subordination to the new imperialism that is neo-liberalism, to ‘the market’ and to another axiomatic trio – liberalisation, deregulation, and privatisation.³⁹ In this

³⁶ *Ibid* Part III Title III Chapter V Section 5 Article III-282(1)(g).

³⁷ Conference for Security and Co-operation in Europe <http://www.hri.org/docs/Paris90.html>

³⁸ Global Compact <http://www.unglobalcompact.org/>

³⁹ A more extensive account of the setting and of these axiomatic trios can be found in Fitzpatrick *Modernism* (fn 25 above) at chapter 6. There is, in the context of constitutionalism, an irony with the

relentless instrumental ethos, public institutions are reshaped and realigned in response to the most detailed and tentacular requirements of 'good governance'. Neo-liberal economic relations become not just co-present with or a contending influence on constitutional matters, but a predetermination of and pervasive presence in them. Although the grinding insistence on human rights, democracy and the rule of law may at least retain a touch of the constitutionally exalted, this new constitutionalism, just like that draft constitution of the European Union, has a characteristic concern with the more mundane. Its conditionalities and such seep into the minutiae of everyday life, either in their own specificity or in the 'market-led' existence it promotes: organising, or disorganising, for example health services, education, the provision of water – the conditioned existence with which Africa is more familiar than most.

This account of the new constitutionalism should culminate with the instance where its economic thrust achieves the most geographically extensive and the most institutionally concentrated constitutional existence, the World Trade Organisation (WTO). Given the strength of its provisions for enforcement and given its effective judicial apparatus, the WTO's requirements may well increasingly penetrate the national domain, but in constitutional terms the most significant for now involve an extension of the General Agreement on Trade in Services (GATS) being negotiated within the WTO.⁴⁰ The predominant aim of the exercise is to require nation-states to allow non-state actors, including foreign corporations, to compete to perform public services. There are twelve categories of services being covered in the

instrumental subordination of the rule of law. In a common usage 'constitutionalism' imports adherence to the rule of law, but the rule of law is impossible when 'it' is used as a conduit for rule by something else.

⁴⁰ See generally GATSwatch <http://www.gatswatch.org/>.

negotiations: These include education, health and social services, and transport. There are also a large number of sub-categories which include postal services, scientific research, and rubbish collection. Some might be relieved to see that the terms of the negotiation provide that the agreement will not apply to governmental services. This relief would, however, be short-lived because such exempt governmental services exclude any services supplied on a commercial basis or in competition with other service suppliers. And, of course, these days it is difficult to find a governmental service which would fall outside of that definition. In the UK education, for example, competes with private suppliers and even 'public' education is now at times contracted out to the 'private' sector. There are prisons run by 'private' corporations. And so on. Not only would governmental services be opened up to competition but barriers to that competition would be prohibited and the erection of laws or regulations which might interfere with the 'freedom' of that competition could be set aside by the Dispute Settlement Body of the WTO. This is where the new constitutionalism coming from within meets its paradigm location without, the WTO, and the two fuse as one.

If that culmination is linked to the indistinction between the national and the international, we should expect that the impact of the new constitutionalism on the national domain is, as it were, internally generated also and not confined to its intrusion from without. And such *mirabile dictu* is the case. Taking an admittedly stark instance, in the UK there have been extensive denationalisations and privatisations. Most functions of local government and many functions of national government are now subjected to competitive tendering so as to enable private contractors to perform them. There is an expansion of private finance initiatives – the intimate involvement of 'private' capital in governmental projects. Many government bodies concerned with the

delivery of services or purely 'executive' functions have been hived off into semi-autonomous agencies. Decisions about much of national economic policy have been transferred to the Bank of England. The involvement of private enterprise in the National Health Service and in public education is being governmentally promoted. The health service itself and public education to a somewhat lesser extent are being reshaped to fit so-called competitive market rationalities. It is perhaps not difficult to relate this to the previous discussion of the GATS.

The permeation of the new constitutionalism is also transforming core institutions of the traditional constitutional order. With the introduction into governmental departments of disciplinary practices associated with management in the so-called private sector, we now have the extension of managerial responsibility, as opposed to the political, along with modes of 'line management', detailed budgetary controls, the setting of objectives for performance backed by systems of assessment, all of which have contributed to what is called a new culture within the public bureaucracy (and all of which are oppressively familiar to us in universities). This profound reconstituting of nation and society is taking place, taking a place, within traditional constitutional forms and structures, and doing so as if it were a marginal modification of them. Or that same reconstituting at times takes place, takes a place to itself, quite apart from the constitutional traditionally conceived, and thence tends not to be seen as having constitutional significance. Yet in both places, in their combination, there is an opening out of the constitutional to new ways of being, to a detailed reconstitution of society.

5 THE NEW CONSTITUTIONALISM 2

Allow me now to invoke sovereignty as a setting for the promised extension of the new constitutionalism to matters typically taken to be within the national domain. Belated as its entry may appear, sovereignty could have been immediately taken as an instance of the logic of being together that has, hopefully, sustained the paper thus far. Not only does sovereignty, as we will now see, combine the determinate and the responsive dimensions of being together but it also embodies and gives effect to occidental formations of power in which the determinate dimension would envelop the responsive.⁴¹ Having introduced sovereignty, and national sovereignty in particular, I will bring it to bear in locating the new constitutionalism within in the national domain.

To concentrate this account of sovereignty I will initially appropriate antinomies of sovereignty offered by Derrida – appropriate them more as a koan than as bringing his own engagement fully to bear. Sovereignty says Derrida ‘is undivided, unshared, or it is not’, yet he would ask: ‘What happens when...[sovereignty] divides? When it must, when it cannot not divide?.’⁴² There is some merging of these seeming opposites when Derrida talks about ipseity in terms of ‘the sovereign and reappropriating gathering of self in the simultaneity of an assemblage or assembly, being together or “living together,” as we say’.⁴³ Which, none too fortuitously, brings us back to the existential logic of being together which I will now abruptly match with Derrida’s antinomies. If, then, we return to this logic and to the dimensions of commonality, the determinate dimension could be seen as calling for an

⁴¹ Of course what I have opened up here is the conceptual containment or reification that endows, some would say afflicts, occidental thought. Taking on sovereignty seemed, at this stage of the paper, to be adventurous enough.

⁴² Derrida J *Without alibi* (trans. Kamuf P) (2002) xix-xx.

⁴³ Derrida J *Rogues: Two essays on reason* (rans. Brault P-A and Naas M) (2005) 11.

experientially undivided cohering; the responsive dimension could be seen as matching the necessity for sovereignty, like any vital organisation, to responsively incorporate and assemble the multitude of disparate forces that continually come to reconstitute it. For this projected assembling sovereignty must be intrinsically receptive to plurality. To be so receptive, sovereignty must always be incipiently vacuous, always capable of emptying any existent content. So, appropriating another arcanum, Nancy would find that 'sovereignty is nothing', 'bare', an 'empty place'.⁴⁴

How then does sovereignty combine the stasis of the determinate with the evanescence brought about by the responsive? The resolution that concerns me here typifies an occidental national sovereignty, the sovereignty of modern nationalism. Such a sovereignty, like its exhausted sacral predecessors, can marvellously fuse being determinate with a responsiveness prehensively subjected to that sovereignty's unconstrained efficacy. Unlike those predecessors, such sovereignty does this without recourse to a transcendental reference integrating these two dimensions.⁴⁵ Rather, this sovereign power can enclose itself yet extend indefinitely, subsist finitely yet potentially encompass what is beyond its existent content. Through the illimitable range of its responsive dimension, the sovereign nation asserts its hold on the universal. And for such sovereignty to achieve a constituent coherence, this universality has to be integrated with its determinate dimension – integrated into emplaced presence, the undivided and unshared.

I will now return to the new constitutionalism by way of two effects of this universal, this sovereign scheme. One has to do with the efficacy of the

⁴⁴ Nancy (fn 1 above) 36, 147.

⁴⁵ For an account of this transition or non-transition and related sources see Fitzpatrick P "“What are the gods to us now?”: Secular theology and the modernity of law' (in press) *Theoretical Perspectives in Law*.

occidental template of nation, the other with its embedded imperialism. What impels the engagement with both effects is, bluntly, that the universal allows of nothing beside it.

As for the occidental template of nation, we have already seen how the claim to a sovereign completeness both grounds and delimits the sovereign nation in its relation to the international. That claim, in effect a claim to the universal, enabled the particular nation to assert some ultimate power over its own domain. This emplaced universal, however, left nothing beyond it, no connecting matter, mediating the relation.⁴⁶ Hence, as we saw, the nothingness, the absence of any place 'left for internationalism'.⁴⁷ The new constitutionalism, as we have also seen, not only counters that sovereign claim through its own constitutional formations outside of the national domain, but counters it also by permeating and disaggregating it within. That same process is quickening within what is still customarily taken to be the national domain.

The national template bestowed by the Occident is the antithesis of that process. Its ur-text comprises a set of constitutional pronouncements generated by the French Revolution. The Declaration of the Rights of Man and of the Citizen of 1789 decreed: 'The Principle of all Sovereignty resides essentially in the Nation. No body nor individual may exercise any authority

⁴⁶ Emplaced sovereignty is of course a *mysterium tremendum* in itself, one that was touched on earlier when looking at the sacral character of sovereignty. The claim to an immanence of the universal, the claim to embody or exemplify the universal, is a neo-sacral claim: '...whenever immanence is interpreted as immanent *to* Something, we can be sure that this Something reintroduces the transcendent': Deleuze G and Guattari F *What is philosophy?* (trans. Burchell G and Tomlinson H) (1994) 45 – their emphasis.

⁴⁷ Bauman (fn 18 above) for the same quotation, and see generally the text of this paper above and following that note.

which does not proceed directly from nation'.⁴⁸ The Constitution of 1791, although short-lived, reaffirmed the abolition of what Montesquieu called 'intermediate ranks' in a way that rendered the political relation as one between the now 'indivisible' sovereign nation and the citizen.⁴⁹ This is a citizenry politically reduced by the very rights that were to empower it, rights that the Declaration announced as 'natural' and 'sacred' and rights that the Constitution rendered 'natural' and 'fundamental'.⁵⁰ Marx captured the constitutional shift in these terms:

Feudal society was dissolved into its foundation [*Grund*], into *man*. But into man as he really was its foundation – into *egoistic* man

This *man*, the member of civil society, is now the foundation, the presupposition of the *political* state. In the rights of man the state acknowledged him as such

...

The *constitution* of the *political state* and the dissolution of civil society into independent *individuals* – who are related by *law* just as men in the estates and guilds were related by *privilege* – are achieved in *one and the same act*. But man, as member of civil society, inevitably appears as *unpolitical* man, as *natural* man. The rights of man appear as natural rights, for *self-*

⁴⁸ Declaration of the Rights of Man and of the Citizen Article 3

<http://www.hrcr.org/docs/frenchdec.html>.

⁴⁹ The Constitution of 1791 Preamble Title II and Title III Section 1

<http://sourcebook.fsc.edu/history/constitutionof1791.html>. An ironic portent of the discussion soon to follow involving colonization and indigenous peoples can be found tucked into a rag-bag of 'miscellaneous provisions' right at the end: 'The French colonies and possessions in Asia, Africa and America, although constituting part of the French Dominion, are not included in the present Constitution'. For 'intermediate ranks' see Montesquieu *The spirit of laws* (1914) Book III par 4.

⁵⁰ Declaration of the Rights of man and of the Citizen Preamble and The Constitution of 1791 Title I.

conscious activity is concentrated upon the *political act*. *Egoistic* man is the *passive* and merely *given* result of the society which has been dissolved, an object of *immediate certainty*, and for that reason a *natural* object.⁵¹

In all, the universal nation would thus occupy and inhibit the generative place of the commonality in its recognising the constituent terms of the singularity of its subjects.

The reach of the appropriated universal, aptly enough, goes even further and would extend to the constitution of carriers of the commonality – carriers often taken as originating the formal constitution. To take a mantric instance, constitutions very often claim an origin as the emanation of a people, the South African constitution being no exception, either directly or, as with the French Declaration and the Constitution of 1791, by way of their representatives. Yet this very people, in a feat of what Derrida would call ‘fabulous retroactivity’,⁵² is a creation of that which it has putatively created, a creature of the constitution and of laws made pursuant to it – electoral laws, laws to do with citizenship and immigration, laws to do with mental capacity, and so on. As with ‘natural man’, this ‘people’ also becomes a manifestation of the natural. We say of former outsiders admitted to its ranks that they are naturalised. Although the people as a category are more inclusive than the erstwhile naturalness of confining the franchise to propertied male citizens or to a racial minority, it remains highly restrictive.

⁵¹ Marx K ‘On the Jewish question’ *Early writings* (1992) 212, at 233-4 – emphasis in original.

⁵² Derrida J ‘Declarations of independence’ (1986) 15 *New Political Science* 7 at 10.

Being excluded from the universal produces a split condition, one that follows on from the first effect of the universal scheme of nation just considered, the efficacy of the occidental template of nation, to the second, the embedded imperialism of that national scheme. The claim to the universal generates modern imperialism through a combination of exclusion and inclusion. Exclusion is inevitable when the universal putatively subsists in some particular such as a determinate nation or empire. What is excluded from the universal, then, can only be utterly beyond it, of a totally different type of existence. The excluded thence become the object of an imperial dispensation and the elect of this diminished world, in another feat of 'fabulous retroactivity', would ground their hold on the universal through the negation of the excluded (a civilized universality in negation of a savage particularity), a ground that cannot be secured positively in the particular.⁵³ But the universal is all-encompassing, and even if for now it subsists only in its exemplary avatars it must be taken to the excluded so that they can come within, if not too precipitately. Since the whole apparatus remains premised on a primal exclusion, however, that exclusion or some equivalent has to endure. The savage has to remain quite unredeemable.

Coming now to the new constitutionalism as internal to nation, and taking the first effect of national universalism, the efficacy of the occidental template of nation, we come to an inevitable agonism. In its pervasion the universal of nation must eliminate or subordinate all 'intermediate ranks', yet it must also extend incipiently to all that comes from beyond the present existence of the determinate nation. These agonistic orientations can coalesce into constitutional forms that are of late taking on a greater salience with the extension of the new constitutionalism into the internal domain of nation. The

⁵³ See Fitzpatrick P *The mythology of modern law* (1992).

new federalism and asymmetrical federalism were instanced at the outset, and of course there have been in recent times a plethora of so-called sub-national formations asserted or achieved. The nation as repository of the universal must ensure that these formations are and remain *sub*-national. Even with the trying case of federations, a centred national sovereignty has tended to predominate, although it remains a vexed issue as to where that sovereignty may be located institutionally. There is, however, one constitutional formation that cannot be encapsulated as sub-national and that formation entails the 'recognition' of indigenous groupings or of their rights or title to land.⁵⁴ And it is here that we will begin to move from the first effect of national universalism, the efficacy of the occidental template, to the second, the embedded imperialism of that universalism.

National recognition of the indigenous is professed as remedying the injustice done by colonial appropriation, but in that laudable aim lays the dissolution of national sovereignty. The sovereign settler state takes its origin from the appropriation of the lands of the colonised. The resulting nation, like any other, is wedded to landed territory but still claims the universal to itself. The land remains held in a deprivation of the colonised and, with yet more 'fabulous retroactivity', that holding and deprivation are founded on the transcendent claim to the universal, a claim which in its completeness excludes the once colonised from any entitlement. More particularly, this

⁵⁴ My constrained concern with constitutional formation here should be related to the more extensive challenge indigenous assertion presents to the integrity of nation: see Perrin C 'Approaching anxiety: The insistence of the post-colonial in the Declaration on the Rights of Indigenous Peoples' in Darian-Smith E and Fitzpatrick P (eds) *Laws of the postcolonial* (1999) 19. It is testament to the intensity of this challenge that the Declaration has only very recently, and after twenty years of discussion, been approved by the UN Human Rights Council, and then with Canada and Russia voting against approval: Minority Rights Group http://www.minorityrights.org/TempNewsArticles/UN_HRC_Statement.html 54.

comprehensive exclusion, as we have just seen, both constitutes and is effected by the emplaced universal, a universal that must also, and contrarily, be all-encompassing. Recognition is presented as an extension to indigenous peoples of the encompassing national universal, and as such presented as a remedying of past 'discrimination' and inequality. However, to recognise as much, to now include the constituent excluded, would be to destroy the sovereign terms of the original and originating 'settlement'. Minimally, it would now involve the opening out of sovereignty to an apposite space of the indigenous, embroil it in a plurality, and disintegrate it in the same instant.

It is little wonder, then, that national courts when confronted with this nemesis, and when confronted with the disappearance of the ground of their own authority, refuse to enquire into the origins of the settler state's sovereignty.⁵⁵ Such a terminal encounter is avoided by the courts freezing the identities, rights and title recognised within a distinctly neo-colonial frame – framed comprehensively within, and subject to, the national society and the national legal system. Furthermore, the colonial constitution of these identities, rights and title is reproduced. That is, these identities, rights and title are tied to an invariant, or to a marginally varying, 'custom' or 'culture'.⁵⁶ Should these talismans change they disappear along with the identities, rights and title made dependent on them. Comparable indigenous claims in South

⁵⁵ This and the following point are illustrated and discussed for various jurisdictions in Motha S 'The sovereign event in a nation's law' (2002) 13 *Law and Critique* 311; Fitzpatrick P "'No higher duty": *Mabo* and the failure of legal foundation' (2002) 13 *Law and Critique* 233; Fitzpatrick P "'We know what it is when you do not ask us": The unchallengeable nation' (2004) 8 *Law.Text.Culture* 263.

⁵⁶ *Ibid.* The impossibility of such radical stasis should not need to be shown but to indicate the dynamism of custom and culture in Africa historically see eg Ranger T 'The invention of tradition in colonial Africa' in Hobsbawm E and Ranger T (eds) *The invention of tradition* (1983) 211, and currently eg Tamale S 'Eroticism, sensuality and "women's secrets" among the Beganda: A critical analysis' (2005) 5 *Feminist Africa* 9 – also available at <http://www.feministafrica.org/05-2005/feature-sylvia.htm>.

Africa have met with a broadly similar response. So far, these claims have been channelled through legislation providing for 'restitution or...equitable redress' in respect of property from which people have been dispossessed.⁵⁷ By invoking this remedy, there is at least an implicit acknowledgement by the claimants that for the case in hand the law of the national government is determinative and so sovereignty is not challenged. Even though that legislation somewhat attenuates the ascription of a stilled and encapsulated identity to indigenous groups, that ascription is nonetheless there and operative in the cases.⁵⁸

6 CONCLUSION

Whether that outcome for indigenous claims is symptomatic of a neo-colonial polity, of a sovereignty that stands in a line of succession from its colonial antecedents,⁵⁹ there is no doubt that the liberation of South Africa was conceived of as a national project and that thrust has been heightened in the constitutions and state-formation of the post-revolutionary period.⁶⁰ Almost as constant as the invocations of nation, however, was the avowed prospect of its unifying an oppressively divided society. In this light, it may be indeed apt to insist that South Africa as 'one, sovereign, democratic'⁶¹ would want to limit or contain division, and the response to the indigenous variant of the new

⁵⁷ Constitution s 25 (7) and Restitution of Land Rights Act 22 of 1994.

⁵⁸ See Mostert H and Fitzpatrick P "Living in the margins of history on the edge of the country" – legal foundation and the Richtersveld community's title to land' (part 1) (2004) 2 *Journal of South African Law* 309 at 316-7, 319, and 329; (part 2) (2004) 3 *Journal of South African Law* 498 at 502. And see *Prinsloo and Botha Family Trust v The Ndebele-Ndzundza Community et al.* SCA Case No.106-2004 pars 29-31, 39. I am grateful to Hanri Mostert for the reference to this case.

⁵⁹ See eg, with pointed relevance to the indigenous context, Ramose MB 'The king as memory and symbol of African customary law' in Hinz M *The shade of new leaves: Governance in traditional authority: A Southern African perspective* (2006) 351. And for something more typically broad brush see Pilger J *Freedom next time* (2006) chapter 4.

⁶⁰ See eg Mandela (fn 11 above) 110-13, 438, and 713-14.

⁶¹ Constitution s1.

constitutionalism is certainly limiting and containing. Yet in the same light it may be questioned whether it is apt to so limit and contain in divisive neo-colonial terms. The same concentrated constitutional attention is not extended to the emanations of the new constitutionalism coming from outside of the national domain, but such attention is not greatly evident anywhere else either – and that is much of the point of this paper. If the constitution in its responsive dimension is not sufficiently vital in engaging with and integrating the new constitutionalism, it will become increasingly irrelevant.

The poignancy of that responsive dimension, a dimension essential to all carriers of our being together, bears as well on the charge that the South African polity remains captive to its antecedents. That polity, however, is not just its determinate presence but also its responsive ability to be otherwise – and the quality of that responsive ability does deserve attention.⁶² In particular, the Constitution of South Africa invites a generosity of response in such provisions as those for its founding ‘values’ and as those contained in its Bill of Rights.⁶³ Even more significant, however, is its formation of a democratic polity – democracy itself being ultimately constituted in responsiveness.

⁶² The political trajectory of South Africa’s ‘negotiated revolution’ in its combining of the determinate and the responsive, or of continuity and change, is finely perceived by George Lawson in Lawson G *Negotiated revolutions: The Czech Republic, South Africa and Chile* (2005) chapter 4.

⁶³ S1 and Chapter 2. For the operation of something akin to this dimension in the Constitutional Court see Van der Walt J *Law and sacrifice: Towards a post-apartheid theory of law* (2005) 140-6.

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